U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 22 June 2004

BALCA Case No.: 2003-INA-116
ETA Case No.: P2002-PA-03377363

In the Matter of:

SHARP CUT CORP.,
Employer,

on behalf of

DMITRI ELANTSEV,
Alien.

Appearance: John J. Gallagher, Esquire
Philadelphia, Pennsylvania
For the Employer and the Alien

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by a landscaping business for the position of Landscaper. (AF 34-35).[2] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File ("AF") and written arguments of the parties. 20 C.F.R. § 656.27(c).

[1] Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File."

STATEMENT OF THE CASE

On April 18, 2001, the Employer, Sharp Cut Corporation, filed an application for alien employment certification on behalf of the Alien, Dmitri Elantsev, to fill the position of Landscape Gardener. The job duties included landscaping and maintenance of private and business residences. The minimum requirement for the position was listed as two years of experience in the job offered. (AF 34-35).

A Notice of Findings ("NOF") was issued by the CO on August 27, 2002, questioning the Employer's ability to guarantee permanent full-time (year-round) work for the petitioned position. The CO observed that the work of a Landscape Gardener is generally performed during certain seasons or periods of the year and not at other times. The Employer was instructed to submit convincing documentation that demonstrates that the petitioned position of Landscape Gardener is a year-round, full-time position. The Employer was instructed that the required documentation must include "payroll records for the last three years for all workers employed in this or similar positions." (AF 30-31).

In Rebuttal, the Employer submitted payroll records for the years 2000, 2001 and 2002 for the person currently holding the position who, the Employer indicated, intends to resign. (AF 22-29).

A Final Determination ("FD") denying labor certification was issued by the CO on November 26, 2002, based upon a finding that the Employer had failed to establish that the job opportunity was a permanent full-time position. The CO noted that the payroll records indicate that the period of employment is less than twelve months per year. In denying certification, the CO observed that:

> [t]he 2000 payroll records indicate that no work was performed during the month of February. In addition, the records reveal that the work hours were significantly reduced during the months of January, March and April of the same year. Likewise, there were no hours of work reported during the months of January and February in 2001. For the year 2002, the hours of employment were significantly reduced from January through March.

(AF 20-21).

The Employer filed a Request for Reconsideration dated December 30, 2002, which was denied by letter dated January 9, 2003. (AF 1-19). The matter was docketed in this Office on February 20, 2003. (AF 1-2). The Employer filed a Statement of Position/Legal Brief on April 15, 2003.

DISCUSSION

In the labor certification process, pursuant to 20 C.F.R. § 656.3, "employment" means permanent full-time work by an employee for an employer other than oneself. 20 C.F.R. § 656.50. The employer bears the burden of proving that a position is permanent and full-time. If the employer's own evidence does not show that a position is permanent and full-time, certification may be denied. *Gerata Systems America, Inc.,* 1988-INA-344 (Dec. 16, 1988). The burden of proof in the labor certification process is on the employer. 20 C.F.R. § 656.2(b); *see also Giaquinto Family Restaurant,* 1996-INA-64 (May 15, 1997); *Marsha Edelman,* 1994-INA-537 (Mar. 1, 1996).

In the instant case, the Employer seeks labor certification for the position of Landscape Gardener. With respect to labor certification for a landscaping position, the Board in *Vito Volpe Landscaping,* 1991-INA-300, *et al* (Sept. 29, 1993)(*en banc*)[3] has held that:

> although these landscaping jobs may be considered "full-time" during ten months of the year, and the need for these jobs occurs year after year, they cannot be considered permanent employment, as they are temporary jobs that are exclusively performed during the warmer growing seasons of the year, and from their nature, may not be continuous or carried on throughout the year.

Vito Volpe, supra.

[3] Recently, the Board in *Crawford & Sons,* 2001-INA-121 (Jan. 9, 2004)(*en banc*) affirmed the *Vito Volpe* decision, declining to overrule or to modify the decision.

The Employer's rebuttal evidence further supports this conclusion. As was noted by the CO, payroll records indicate the period of employment is less than twelve months per year and is not full-time during the winter months.

The Employer submitted evidence in its request for reconsideration to the effect that the worker took off time for personal reasons and the owner was performing landscaping duties in his absence. The Employer further argued that the company had now undertaken snowplowing contracts which would ensure full-time work. Such evidence will only be considered when it could not have been addressed in the rebuttal. *Harry Tancredi,* 1988-INA-441 (Dec. 1, 1988)(*en banc*). As was noted by the Board in *Carlos Uy III,* 1997-INA-304 (Mar. 3, 1999)(*en banc*), "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." The Employer failed to do so and labor certification was properly denied.

Even if the Employer's new evidence could be considered, it would not establish a permanent, full-time position for a Landscape Gardener. The Employer argued that the employee who had previously held the position took time off during the winter season. (AF 2-3). As the CO correctly observed, the payroll records indicate that the worker did not work at all in February and worked significantly fewer hours in January, March, and April. If the work load was so light that the worker was able to take a full month off and work part-time for three months, there does not appear to be enough work to support a full-time position. The employee appeared to take the same time off during each year for which records were submitted. This further confirms the CO's finding that the position was not a full-time, year-round position. The Employer submitted payroll records of the company's owner and claimed that he performed the position duties during that time period. However, these records do not reflect additional time worked by the owner or an increase in wages paid during that time. (AF 4-14).

In addition, the Employer claimed that it had undertaken new snow plowing contracts. However, the documentation presented consisted of three estimates for snow plowing services and one letter confirming the acceptance of the estimate. (AF 15-18). Although the Employer indicated that there were multiple contracts, he has only provided one letter confirming an interest in the Employer's estimate. Thus it does not appear that there is a need for a full-time employee based on this one snow plowing contract. As such, even given the documentation submitted with the Request for Reconsideration, the Employer has failed to establish that a permanent, full-time year-round position exists for a Landscape Gardener.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting

full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.